Supreme Court, U.S.
FILED
NOV 19 2009
OFFICE OF THE CLERK

146

(3)

No. 09-194

In the Supreme Court of the United States

FRANCOISE ANATE GOMIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to establish "to the satisfaction of the Attorney General" either "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of her asylum application under 8 U.S.C. 1158(a)(2)(D).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 22

TABLE OF AUTHORITIES

Cases:

A-K-, In re, 24 I. & N. Dec. 275 (B.I.A. 2007), petition for review denied *sub nom Kane* v. *Holder*, 581 F.3d 231 (5th Cir. 2009) 21

Almuhtaseb v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006) ... 16

Chacon-Botero v. *United States Att'y Gen.*, 427 F.3d 954 (11th Cir. 2005) 16

Chen v. *United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) 16

D-I-M-, In re, 24 I. & N. Dec. 448 (B.I.A. 2008) 21

Eman v. *Holder*, cert. denied, No. 08-1317 (Oct. 5, 2009) 10

Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 15

Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 16

Haig v. *Agee*, 453 U.S. 280 (1981) 11

Higuit v. *Gonzales*, 433 F.3d 417 (4th Cir.), cert. denied, 548 U.S. 906 (2006) 13

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 4

INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 19

INS v. *St. Cyr*, 533 U.S. 289 (2001) 14

Ignatova v. *Gonzales*, 430 F.3d 1209 (8th Cir. 2005) 16

Cases—Continued: Page

Kourouma v. *Mukasey*, 128 S. Ct. 1868 (2008) 11
Lopez-Cancinos v. *Gonzales*, 550 U.S. 917 (2007) 11
Lopez-Soto v. *Ashcroft*, 383 F.3d 228 (4th Cir. 2004) 4
Pierre, In re, 15 I. & N. Dec. 461 (B.I.A. 1975) 4
Ramadan v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) .. 16, 17
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 15
Sukwanputra v. *Gonzales*, 434 F.3d 627 (3d Cir. 2006) 11, 16
Usman v. *Holder*, 566 F.3d 262 (1st Cir. 2009) 16
Viracacha v. *Mukasey*:
129 S. Ct. 451 (2008) 10
518 F.3d 511 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008) 16
Webster v. *Doe*, 486 U.S. 592 (1988) 11
Zhu v. *Gonzales*, 493 F.3d 588 (5th Cir. 2007) 16

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 12
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(a)(2) 13, 18, 21

Statutes and regulations—Continued: Page

8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2, 11, 12, 20
8 U.S.C. 1158(a)(3) 4, 8, 12, 13, 17, 21
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1158(d)(1) 2
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1231 12
8 U.S.C. 1231(b)(3)(A) 3
8 U.S.C. 1252(a)(2) 4
8 U.S.C. 1252(a)(2)(B)(ii) 21, 22
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(b)(4)(B) 19
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 4
8 C.F.R.:
Section 1208.4(a)(2)(A) 2
Section 1208.4(a)(4)(i)(A) 3, 20
Section 1208.4(a)(4)(i)(B) 3, 20
Section 1208.4(a)(4)(ii) 3
Section 1208.4(a)(5) 3, 20
Section 1208.13(a) 2
Section 1208.13(b)(2)(ii) 21
Section 1208.13(b)(3)(i) 21
Section 1208.13(c)(1) 3
Section 1208.16(b)(2) 4

Regulations—Continued: Page

Section 1208.16(c) 3
Section 1208.18(a)(1) 4
Section 1240.8(d) 2

Miscellaneous:

H.R. Rep. No. 72, 109th Cong., 1st Sess. (2005) 14, 15

In the Supreme Court of the United States

No. 09-194

FRANCOISE ANATE GOMIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 571 F.3d 353. The decisions of the Board of Immigration Appeals (Pet. App. 28a-32a) and the immigration judge (Pet. App. 33a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. A petition for a writ of certiorari was filed on August 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demon-

strates that she is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that she is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file her application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if she demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect her eligibility for asylum or "extraordinary circumstances" that excuse her failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that her application for asylum was filed within one year of her entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include "[c]hanges in conditions in the applicant's country of

nationality" and "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared prosecution that place the applicant at risk." 8 C.F.R. 1208.4(a)(4)(i)(A) and (B). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that she filed her asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

Withholding of removal is available if the alien demonstrates that her "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal,

an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975). An alien is not eligible for withholding of removal if he or she "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that she would more likely than not be tortured if removed to a certain country may obtain CAT protection. To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there are changed or extraordinary circumstances warranting consideration of an untimely application. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section)

> which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner is a native and citizen of Senegal. Pet. App. 2a. She arrived in the United States in January 2001 as a non-immigrant worker with permission to remain through April 2003. *Id.* at 3a.

Petitioner remained in the United States after her lawful status expired. Pet. App. 3a. In June 2005, she filed an application for asylum, withholding of removal, and CAT protection. *Ibid.* Petitioner contended that she would be persecuted if she returned to Senegal because her parents wanted her to undergo female genital mutilation (FGM) and to participate in an arranged marriage. *Ibid.* The Department of Homeland Security charged petitioner with being removable as an alien who remained in the United States beyond the time permitted and referred her asylum application to an immigration judge (IJ). *Id.* at 3a, 34a; see Administrative Record (A.R.) 330; see also 8 U.S.C. 1227(a)(1)(B).

At her removal hearing, petitioner conceded that she was removable as charged. She renewed her application for asylum, withholding of removal, and CAT protection. Pet. App. 3a-4a, 34a. In the alternative, she sought voluntary departure. *Ibid.* Petitioner was the only witness to testify at her removal hearing. *Id.* at 35a. She stated that she is a member of the Djola ethnic group, some of whose members practice FGM. *Id.* at 4a. She explained that she had been enrolled in college in Senegal, but left

home because her father wanted her to undergo FGM and take part in an arranged marriage. *Id.* at 4a, 36a; A.R. 160-162. Petitioner stated that her uncle helped her to obtain a work visa to leave Senegal and work in the United States. Pet. App. 4a, 36a-37a; A.R. 163-164. Petitioner stated that she filed her asylum application in June 2005 because that is when she learned that FGM had been performed on her sister. Pet. App. 37a; A.R. 166.

The IJ found petitioner removable as charged, rejected her asylum, withholding, and CAT claims, and granted her application for voluntary departure. Pet. App. 33a-48a. The IJ determined that petitioner was a credible witness, even though her testimony was "somewhat at odds and inconsistent with State Department Reports." *Id.* at 42a. The IJ found petitioner ineligible for asylum, however, because she did not file her application within one year of entry into the United States and did not demonstrate changed or extraordinary circumstances to excuse her untimely filing. *Id.* at 43a-44a. As the IJ explained, petitioner "left Senegal in 2001, allegedly to avoid FGM and forced marriage," but did not seek asylum until June 2005. *Id.* at 43a. The IJ determined that, even if petitioner's "sister underwent FGM in the interim period, and even if [petitioner] continued to receive threats or pleas from her parents that she should return and face the same, that does not constitute changed or extraordinary circumstances." *Id.* at 44a. Instead, the IJ explained, those circumstances simply "confirm[]" a "preexist[ing] risk of persecution" that existed when petitioner came to the United States. *Ibid.*

The IJ then determined that petitioner failed to meet her burden of establishing that it was more likely than not that she would be persecuted if returned to Senegal,

as is required for withholding of removal. Pet. App. 44a-46a. The IJ determined that the chances of petitioner being forced to undergo FGM in Senegal are "small" because the evidence in the record showed that "most Senegalese women have not undergone FGM"; FGM "is growing less common in Senegal"; the State Department's report on FGM indicates that "it is hardly practiced at all in the most heavily populated urban areas," and petitioner lived in an urban center; and those elements of the Djola ethnic group that practice FGM do so as part of a "puberty initiation right," and petitioner was 28 years old. *Id.* at 45a. The IJ also noted that "FGM is a criminal offense in Senegal," carrying a sentence of six months to five years of imprisonment, and that the Senegalese government "has actually prosecuted people for FGM and has fought to end it." *Id.* at 46a. Finally, the IJ stated that petitioner is a well-educated adult and therefore likely could "relocate in a safe place in Senegal." *Ibid.*

The IJ denied petitioner's claim for CAT protection, finding that she failed to show that it is more likely than not that she would be subjected to torture and that, in any event, any such risk "would certainly not be with the consent or acquiescence of the government of Senegal or government officials." Pet. App. 46a. Finally, the IJ granted petitioner's application for voluntary departure and stated that she must depart the United States by January 8, 2007. *Id.* at 47a-48a.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 28a-32a. It determined that petitioner's asylum application was untimely and upheld the IJ's determination that petitioner failed to demonstrate changed or extraordinary circumstances that would excuse her untimely filing. *Id.* at 29a-30a.

The Board found "no error" in the IJ's decision, explaining that petitioner contended that she feared FGM when she left Senegal in 2001 and "remained in the United States because she continued to fear FGM." *Id.* at 30a.

The Board also determined that petitioner failed to meet her burdens for withholding of removal and CAT protection. The Board explained that the record evidence showed that "the practice of FGM is growing less common and is rare in large urban areas"; that "the government of Senegal has enacted laws criminalizing the practice," "has prosecuted those caught engaging in the practice," and "has fought to end the practice by collaborating with other groups to educate people about [its] inherent dangers"; that "140 villages renounced the use of FGM" in 2004 and 2005; and that "90 percent of the females who undergo FGM are between 2 and 5 years of age." Pet. App. 30a-31a. The Board then stated that petitioner was required to voluntarily depart the United States by 60 days from the date of its decision. *Id.* at 32a. To the best of the government's knowledge, petitioner did not depart within the time permitted.

Petitioner filed a motion for reconsideration, which the Board denied, explaining that petitioner "has presented no [additional] legal argument, change of law, or overlooked argument." Pet. App. 49a-51a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-27a. As relevant here, the court held that under 8 U.S.C. 1158(a)(3), it lacked jurisdiction to review the Board's determination that no changed or extraordinary circumstances excused petitioner's late filing of her asylum application. Pet. App. 10a-13a. The court explained that it lacked jurisdiction "under the express language of § 1158(a)(3)" to review both "whether an alien has complied with the one-year

time limit *and* whether there are changed or extraordinary circumstances excusing the delay." *Id.* at 11a-12a. The court further concluded that Section 1252(a)(2)(D) did not restore jurisdiction over petitioner's claim, because "the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances." *Id.* at 12a. The court stated that "absent a colorable constitutional claim or question of law, [its] review of the issue is not authorized by § 1252(a)(2)(D)." *Ibid.*

The court then upheld the Board's determination that petitioner failed to meet her burden for withholding of removal as supported by substantial evidence. Pet. App. 13a-21a.[1]

Judge Gregory concurred in part and dissented in part. Pet. App. 21a-27a. As relevant here, he agreed that the court lacked jurisdiction over petitioner's challenge to the Board's denial of her asylum claim. *Id.* at 22a.

5. After the certiorari petition was filed, a member of the court of appeals requested a poll on whether the court should rehear the case en banc. The court then denied rehearing en banc. See No. 08-1389, 2009 WL 2992535 (4th Cir. Sept. 21, 2009). Two Judges authored opinions respecting denial of rehearing en banc, both of which focused on whether the Board erred in denying withholding of removal. See *id.* at *1 (Niemeyer, J., concurring in denial of rehearing en banc); *id.* at *1-*3 (Gregory, J., dissenting from denial of rehearing en banc, joined by Michael, Motz, King, and

---

[1] Petitioner did not renew her claim for CAT protection before the court of appeals.

Duncan, JJ.). Neither opinion addressed the question presented here.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that it lacked jurisdiction to review the determination of the Board of Immigration Appeals that petitioner failed to demonstrate to its satisfaction either changed circumstances or extraordinary circumstances that would warrant consideration of her untimely asylum application. The court of appeals correctly rejected that contention. But while petitioner's application for the discretionary relief of asylum was rejected as untimely, she was still permitted to apply for withholding of removal. The IJ and the Board fully considered petitioner's withholding claim on the merits and rejected it as not supported by the evidence. The court of appeals sustained the Board's ruling on that issue, and petitioner has not sought review of that ruling in this Court. This case thus presents only the issue whether the court of appeals erred in concluding that it did not have jurisdiction to review the Board's rejection as untimely of petitioner's additional request for the related discretionary relief of asylum.

All but one of the courts of appeals to consider the issue have held that they do not have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to demonstrate to its satisfaction that there were changed circumstances or extraordinary circumstances warranting consideration of an untimely application. The Ninth Circuit has reached a contrary conclusion. The Court has nonetheless denied certiorari petitions raising this issue on a number of occasions. See *Eman* v. *Holder*, cert. denied, No. 08-1317 (Oct. 5, 2009); *Viracacha* v. *Mukasey*, 129 S. Ct. 451 (2008) (No.

07-1363); *Kourouma* v. *Mukasey*, 128 S. Ct. 1868 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740). No different disposition is warranted here. Petitioner did not brief the question presented to the court below, and the court consequently did not address the arguments petitioner now makes in support of jurisdiction. Moreover, the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of her request for asylum, and resolution of the jurisdictional question likely would not change the outcome of petitioner's case.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of changed circumstances or extraordinary circumstances that warrant consideration of an untimely claim for relief is committed to the Attorney General's discretion based on his own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred

judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing." 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 16-17, 20), her petition for review challenged a determination that she had failed to sufficiently demonstrate changed or extraordinary circumstances to forgive that untimely filing. Judicial review of petitioner's challenge is therefore barred by 8 U.S.C. 1158(a)(3).

Significantly, however, an alien is not without an avenue for relief when the Attorney General determines that she has not demonstrated to his satisfaction the existence of circumstances excusing compliance with the one-year deadline for filing an application for the discretionary relief of asylum. The alien remains eligible for mandatory withholding of removal under 8 U.S.C. 1231. But in this case the IJ and the Board rejected that claim. The court of appeals sustained that determination, and petitioner has not sought review of the court of appeals' ruling in this Court.

Petitioner contends (Pet. 29-36), however, that judicial review of the rejection of her asylum claim as untimely should have been available as well, because this case falls within the provision in 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, that allows

for judicial review of "questions of law." The structure of 8 U.S.C. 1158(a)(2) and (3) demonstrate, however, that Congress did not regard a fact-bound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving her procedural default and consideration of her untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the Board's fact-bound determination did not raise a "question[] of law."

In this case, the applicable principles are undisputed. Petitioner has not advanced any argument that the Board erred in construing the terms "changed circumstances" or "extraordinary circumstances," even assuming that the Attorney General's application of those provisions in the course of a determination under 8 U.S.C. 1158(a)(2) might be reviewable in some circumstances. Instead, petitioner takes issue with the Board's holding that she failed to adduce facts sufficient to show a change in conditions material to her asylum application. Pet. App. 29a-30a. That determination is not a legal determination, but a factual determination involving judgment and discretion. If petitioner's fact-bound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not

free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006).

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted 8 U.S.C. 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's petition for a writ of habeas corpus "raise[d] a pure question of law"—whether, "as a matter of statutory interpretation," the Board erred in determining that he is not eligible for relief. *Id.* at 298. The alien did not challenge the Board's fact-finding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid.* *St. Cyr* distinguished those types of claims from a "pure legal claim" such as a statutory-interpretation issue, and only stated that precluding judicial review of the latter would raise serious constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable").

The Conference Report accompanying the REAL ID Act demonstrates that Congress did not intend the courts of appeals to review the application of undisputed rules of law to the facts of particular cases. Thus, the Conference Report made clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Rep. No. 72, 109th Cong., 1st Sess.

175 (2005). Instead, the Report explained that when a court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the 'substantial evidence'" standard. *Id.* at 175-176. This Court has taken a similar approach in other contexts. For example, in *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-841 (1996), involving tort claims in district court, the Court concluded that "[t]he issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." In the INA, involving the special context of judicial review of agency action, Congress chose to preclude review of such fact-based determinations that arise in connection with an alien's request that the Attorney General exercise his discretion to forgive her procedural default and consider an untimely asylum application. Reading "questions of law" in 8 U.S.C. 1252(a)(2)(D) to encompass determinations such as those at issue here would have the opposite effect of what Congress intended when it committed certain determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a fact-bound challenge to a judgment call by the agency, her petition for review did not raise a "question[] of law" on this issue under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

2. In the decision below, the Fourth Circuit joined the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits in holding that such a claim normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*,

Usman v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (changed or extraordinary circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006) (changed circumstances); *Sukwanputra*, 434 F.3d at 635 (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish changed circumstances or extraordinary circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

In contrast, the Ninth Circuit has held that an alien's challenge to the Board's determination that she has not established changed circumstances or extraordinary circumstances does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed

facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[2]

That disagreement in the courts of appeals does not warrant this Court's attention at this time or in this case.

a. First, as petitioner acknowledges, she did not present any argument on the question presented to the court of appeals. See Pet. 15 n.2 (petitioner "did not brief the jurisdictional issues"). Petitioner's opening brief in the court of appeals simply asserted that the court of appeals had jurisdiction over her petition for review as a general matter—because it was timely filed in the proper court—and made no mention at all of the jurisdictional bar contained in 8 U.S.C. 1158(a)(3) that applied to the Board's asylum determination or to the jurisdiction-restoring provision in 8 U.S.C. 1252(a)(2)(D). Pet. C.A. Br. 11-12. The government then argued in its brief both that Section 1158(a)(3) barred jurisdiction and that Section 1252(a)(2)(D) did not restore jurisdiction in this case. Gov't C.A. Br. 21-24. Petitioner did not file a reply brief. As a result, petitioner did not present to the court of appeals *any* of the arguments that she now advances, including her argument that the application of settled law to the facts of a particular case constitutes a "question[] of law" under 8 U.S.C. 1252(a)(2)(D).

The court of appeals addressed the jurisdictional issue, but its analysis was relatively brief. The court

---

[2] Petitioner cites (Pet. 23-24, 26-28) a variety of cases concerning whether determinations other than whether an alien demonstrated changed or extraordinary circumstances to excuse an untimely asylum filing present "questions of law." Because whether a petition for review presents a "question[] of law" depends on the precise nature of the claim raised (Pet. 23), those cases are inapposite.

stated that it lacked jurisdiction to review petitioner's asylum claim because "the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances"; "absent a colorable constitutional claim or question of law, [the court's] review of the issue is not authorized by § 1252(a)(2)(D)." Pet. App. 12a. But, presumably because petitioner did not address the issue, the court did not elaborate upon what type of claim would present a "question of law," and it did not address the arguments petitioner now advances. Thus, the court did not opine on whether "Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law," Pet. 23; did not address whether petitioner presented a "mixed question of law and fact" or "how to identify a reviewable mixed question of law and fact," Pet. 24; and did not distinguish between "mixed questions [of law and fact]" and "factual or discretionary claims," *ibid.*

In light of petitioner's default below in not presenting arguments in support of jurisdiction to review the Attorney General's determination under 8 U.S.C. 1158(a)(2), this case would not be an appropriate vehicle for considering whether or to what extent Section 1252(a)(2)(D) permits judicial review of such determinations, or more generally whether it provides jurisdiction to consider contentions that the Board erred in applying settled law to the facts of an alien's particular case—an issue that the court of appeals did not address. Instead, the Court should await a case in which the jurisdictional issue was disputed below and where the court of appeals specifically addressed whether the application of settled

law to fact presents a "question[] of law" within the meaning of Section 1252(a)(2)(D).

b. Even if there were jurisdiction, petitioner could not show that the Board erred in failing to consider her untimely asylum application. The governing considerations, which are cast in general terms for the Attorney General to consider to his satisfaction, are undisputed. Petitioner has never contended that the Board used an incorrect legal standard. Instead, she argues that the Board erred in "appl[ying] the statutory standards to the historical facts of the case." Pet. 32.

If the court of appeals were to consider that argument, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the Board's fact-specific conclusions were not supported by substantial evidence. The only argument petitioner advanced below was that her sister's experience with FGM constituted "changed circumstances" that warranted the Attorney General's exercise of discretion to consider her application. A.R. 97. But as the IJ explained, that is not the type of circumstance that would warrant consideration of petitioner's untimely asylum filing, because petitioner's own circumstances had not changed. Petitioner contended that she "left Senegal in 2001 * * * to avoid FGM and forced marriage," and she claimed that her fear continued in June 2005. Pet. App. 43a. The IJ reasonably determined that even if petitioner's "sister underwent FGM in the interim period, and even if [petitioner] continued to receive threats or pleas from her parents that she should return and

face the same," that simply "confirm[ed]" a "preexist-[ing] risk of persecution" that existed when petitioner came to the United States. *Id.* at 43a-44a. There is no reason to believe that the fact-bound assessment that the baseline remained unchanged would be overturned.

Moreover, petitioner did not contend that "[c]hanges in conditions in [her] country of nationality" made her more likely to be persecuted," 8 C.F.R. 1208.4(a)(4)(i)(A); indeed, she acknowledged that Senegal had increased its efforts to stamp out FGM, Pet. C.A. Br. 27. Nor did petitioner contend that there were any changes in "applicable U.S. law" or that she engaged in any "activities * * * outside the country of feared prosecution that place[d] [her] at risk." 8 C.F.R. 1208.4(a)(4)(i)(B). And petitioner has never claimed that she was operating under any legal disability or that there were any other personal circumstances that would constitute "extraordinary circumstances" and be "directly related to the failure to meet the 1-year deadline." 8 C.F.R. 1208.4(a)(5) (listing, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel"). Under the circumstances, petitioner has failed to demonstrate changed circumstances or extraordinary circumstances within the meaning of Section 1158(a)(2)(D).

c. Even if petitioner could demonstrate that the Board erred in its determination that she failed to show circumstances sufficient to excuse her untimely asylum application, petitioner's asylum claim likely would fail on the merits. If an asylum applicant could avoid persecution by relocating within her home country, and it

is reasonable to expect her to do so, then she does not have a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(2)(ii). Here, where petitioner has not alleged past persecution and alleges persecution only by her parents—not "persecution [that] is by a government or is government-sponsored"—she bears the burden of proving, by a preponderance of the evidence, that relocation would not be reasonable. 8 C.F.R. 1208.13(b)(3)(i); *In re D-I-M-*, 24 I. & N. Dec. 448, 450 (B.I.A. 2008). The IJ concluded, in the context of rejecting petitioner's claim for withholding of removal, that petitioner likely would be able to relocate within Senegal because of her age and education. Pet. App. 46a. The court of appeals also suggested as much, noting petitioner's age and education and observing that Senegal is a country of over 12 million people. *Id.* at 5a n.*, 9a. And, in a precedential decision recently affirmed by the Fifth Circuit, the Board concluded, based on country conditions in Senegal, that an alien's daughters could avoid being subjected to FGM there by relocating to an area of comparative safety. See *In re A-K-*, 24 I. & N. Dec. 275, 277 (B.I.A. 2007), petition for review denied *sub nom. Kane* v. *Holder*, 581 F.3d 231 (2009). It is therefore highly unlikely that petitioner would be able to prove that it would be unreasonable for her to relocate to a safe place in her home country. Review by this Court is unwarranted for this reason as well.[3]

---

[3] Because jurisdiction to review the Attorney General's timeliness determination under 8 U.S.C. 1158(a)(2) in this case was precluded by the special jurisdictional bar in 8 U.S.C. 1158(a)(3), there is no need to consider whether jurisdiction was also precluded by 8 U.S.C. 1252(a)(2)(B)(ii), which bars jurisdiction to review any decision of the Attorney General that is specified under the relevant subchapter of the INA to be in the discretion of the Attorney General. There accordingly

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

NOVEMBER 2009

---

is no occasion to hold the petition in this case pending the Court's decision in *Kucana* v. *Holder*, No. 08-911 (argued Nov. 10, 2009), which concerns the scope of 8 U.S.C. 1252(a)(2)(B)(ii). (Section 1252(a)(2)(B)(ii) excepts from its bar "the granting of relief under section 1158(a)," but that exception refers to the granting (or denial) of the discretionary relief of asylum on the merits, not a determination concerning the one-year filing requirement.)